

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

Aisha Pope, #228305

Plaintiff,

v.

Corizon Health, MDOC et al

Defendants,

Case No.: 2:19-cv-10870

District Judge: David M. Lawson

Magistrate Judge: David R. Grand

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**PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' EXPERTS
THOMAS FOWLKES AND JOEL APPEL**

Plaintiff submits the following motion to strike Defendants' experts Thomas Fowlkes and Joel Appel. For the reasons states in the attached brief, Plaintiff

respectfully requests that the Court strike Defendants' experts for Defendants failure to comply with the expert disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure.

Date: October 03, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Keith Altman', written over a horizontal line.

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**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION TO STRIKE
DEFENDANTS' EXPERTS THOMAS FOWLKES AND JOEL APPEL**

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I. TABLE OF AUTHROITIES

Cases

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II. BACKGROUND

Plaintiff filed a *pro se* Complaint on March 25, 2019. (ECF 1). On April 20, 2022, the Court entered a revised Scheduling Order (ECF 87) setting Defendants' deadline for expert disclosures for June 6, 2022. Defendants' expert report and all facts and testimony regarding expert, Thomas D. Fowlkes, M.D., should be stricken in its entirety. On February 22, 2021, MDOC Defendants filed Initial Witness List (ECF 64). On February 22, 2021, Corizon Defendants filed Initial Witness Lis (ECF 65). On April 18, 2021, MDOC Defendants filed a Supplemental Witness List adding "Kathy Wild – Expert Ms. Wild is an expert in the field of corrections nursing." (ECF 68). MDOC Defendants listed in their Initial Witness List all co-defendants' experts. (ECF 64). However, MDOC Defendants nor Corizon Defendants listed Thomas D. Fowlkes, M.D. or Joel Appel on any of their initial or supplemental witness lists. On April 20, 2022, the Court entered a revised Scheduling Order (ECF 87) setting Defendants' deadline for expert disclosures for June 6, 2022. MDOC Defendants nor Corizon Defendants filed expert disclosures or expert reports pursuant to Fed. R. Civ. P. 26(a)(1)(2) and Fed. R. Civ. P. 702, 703 and 705. Corizon Defendants filed their Motions for Summary Judgment pursuant to Fed. R. Civ. P. 56 on September 9, 2022 (ECF 88 and 90). MDOC Defendants attached an expert report of Thomas Fowlkes pursuant to Fed. R. Civ. P. 26(a)(2)(B) as Exhibit F (ECF 88-7, PageID.1788-1823) to their Motion for Summary Judgment

(ECF 88). Corizon Defendants attached an expert report of Thomas Fowlkes pursuant to Fed. R. Civ. P. 26(a)(2)(B) as Exhibit 2 (ECF 90-2, PageID.2099-2132) to their Motion for Summary Judgment (ECF 90). Additionally, Corizon Defendants attached an expert report of Joel Appel pursuant to Fed. R. Civ. P. 26(a)(2)(B) as Exhibit 3 (ECF 90-3, PageID.2099-2132) to their Motion for Summary Judgment (ECF 90). The expert report of Thomas Fowlkes (ECF 88-7, PageID.1788-1823) (ECF 90, PageID.2099-2132) and expert report of Joel Appel (ECF 90-3, PageID.2099-2132) should be stricken from the record for not complying with Fed. R. Civ. P. 26(a)(1)(2) and Fed. R. Civ. P. 702, 703 and 705.

The basis of Plaintiff's claim is that she did not constitutional receive adequate medical care. MDOC and Corizon Defendants contend that her care was adequate, and their actions were not deliberately indifferent. Clearly, there is a dispute of facts. MDOC and Corizon Defendants have not provided any rebuttal evidence to dispute Plaintiff's claims. The MDOC and Corizon Defendants have not provided an expert physician to advise the Court of the medical standard course of care that should have been provided given Plaintiff's specific health symptoms. Medical treatment must be reviewed on a case-by-case basis and cannot be hypothesized, categorized or generalized.

III. ARGUMENT

Rule 26(a)(2) requires that a party must disclose the identity of expert witnesses and either (1) provide a written report, prepared and signed by the expert witness, or (2) disclose the subject matter on which the witness is expected to present evidence and provide a summary of facts and opinion to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2).

Under Rule 37(c)(1), when a party fails to provide information or identify a witness as required by Rule 26(a) or (e), a party is presumptively not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. Nonetheless, the appropriate sanction for such a violation remains at the discretion of the trial court. *Sommer v. Davis*, 317 F. 3d 686, 692 (6th Cir. 2003).

The burden to show that a failure to disclose was harmless is on the disclosing party. *Roberts ex rel. Johnson v. Galen of Va*, 325 F. 3d 776, 782(6th Cir. 2003). Typically, to show harmlessness, the moving party must show "an honest mistake on the part of a party coupled with sufficient knowledge on the part of the other party." *Sommer*, 317 F. 3d at 692. The MDOC Defendants nor Corizon Defendants requested from this honorable Court to allow their expert reports/opinions to be allowed. Defendants merely included expert testimony without any regard to the Federal Rules of Civil Procedure requirements. Inasmuch as, the expert disclosures were due in June, Defendants had ample time to request leave from the Court to use

expert opinions in support of their Motions for Summary Judgment. Even if the Defendants could show that their failure to comply with the case management order was an honest mistake, Plaintiff does not have sufficient knowledge of the experts or their opinions to be able to craft a rebuttal to their use of the experts in Defendants Motions for Summary Judgment or to cross-examine the experts at the time of trial.

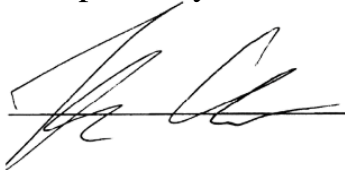
Plaintiff has been severely prejudiced in Defendants' use of the undisclosed experts in support of their Motions for Summary Judgment. Plaintiff will be severely prejudiced at trial if Defendants' expert testimony is allowed. Accordingly, Plaintiff requests this Court strike Defendants' experts and prohibit the testimony of Defendants medical experts at trial.

IV. CONCLUSION

Plaintiff respectfully prays to this honorable Court to grant Plaintiff's Motion to Strike MDOC Defendants' and Corizon Defendants' Experts for Defendants failure to comply with the expert disclosure requirements of Rule 26, and for such other and further relief as this Court deems just and proper.

Date: October 03, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Keith Altman', written over a horizontal line.

Keith Altman, Esq.

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CERTIFICATE OF SERVICE

I certify that on October 03, 2022, I served the foregoing Plaintiff's Motion to Strike Defendants' Expert and Brief in Support upon all parties herein by filing copies of same using the ECF System.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Keith Altman', written over a horizontal line.

Keith Altman, Esq.